

STATE OF MICHIGAN
COURT OF APPEALS

MAROUN J. HAKIM, Personal Representative of
the Estate of JEFFREY ALLEN HAMMOND,
Deceased,

UNPUBLISHED
December 19, 2006

Plaintiff-Appellee,

v

ANGELA JEAN GUASTELLA and WILLIAM
HANLEY,

No. 270322
Macomb Circuit Court
LC No. 05-002503-NI

Defendants-Appellants.

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

Defendants appeal by leave granted a circuit court order denying their motion for summary disposition pursuant to MCR 2.116(C)(10). This is a wrongful death/negligent entrustment action involving a motor vehicle accident in which a vehicle owned by defendant Hanley and driven by defendant Guastella struck and killed plaintiff's decedent, a pedestrian who was jaywalking across Van Dyke Road. We reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendants argue that they were entitled to summary disposition because there was no evidence of negligence by Guastella. We agree. Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." Summary dismissal is proper under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

The driver of an automobile has a duty to use ordinary and reasonable care and caution in operating the vehicle. *Zarzecki v Hatch*, 347 Mich 138, 141; 79 NW2d 605 (1956). Defendants do not dispute that defendant Guastella owed the deceased victim a duty to use ordinary and reasonable care in the operation of her car. However, they argue that Guastella did not breach this duty. The question whether a defendant breached a duty is generally a question of fact for the jury, but when the moving party can show that the nonmoving party's evidence is simply

insufficient to show any negligence or a breach of duty, summary disposition is properly granted. *Latham v Nat'l Car Rental Systems, Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000).

The evidence presented indicated that plaintiff's decedent attempted to cross the three busy northbound lanes of Van Dyke Road. He did not use a crosswalk or cross at a light. He ran into traffic, apparently using his hand to signal drivers to stop. At least one other driver nearly hit him. Defendant Guastella, whose view was blocked by another vehicle, did not see the decedent until they collided. There is no evidence that she was speeding or using an improper lane. Witnesses testified that the decedent simply ran into the road and then into defendant's vehicle. We cannot conclude that Guastella was proceeding without caution and due care. On this record, there is no indication of negligence on Guastella's part. See *Houck v Carigan*, 359 Mich 224; 102 NW2d 191 (1960) (no negligence where the plaintiff attempted to cross street in the middle of a block and darted into the side of the defendant's vehicle). The evidence, when viewed in a light most favorable to plaintiff as the nonmoving party, fails to establish a genuine issue of material fact, and defendants are entitled to judgment as a matter of law.

Reversed and remanded for entry of judgment in favor of defendants. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Kirsten Frank Kelly

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SMOLENSKI, J. (*dissenting*).

Although the record clearly contains evidence that Hammond acted negligently when he crossed the road, see *Malone v Vining*, 313 Mich 315, 321; 21 NW2d 144 (1946) (noting the duty applicable to pedestrians crossing a road), there is also evidence that defendant Guastella breached her duty to use ordinary and reasonable care in the operation of her car. A jury could reasonably conclude that, when Guastella observed the traffic ahead slowing or stopping despite the absence of a traffic device requiring that action, she should have exercised caution to assess the situation. Instead, without a clear view of the situation, Guastella immediately changed lanes and attempted to pass the slowing traffic. Cf. *Johnson v Hughes*, 362 Mich 74, 77-78; 106 NW2d 223 (1960); *Gamet v Jenks*, 38 Mich App 719, 724-725; 197 NW2d 160 (1972). Because there is evidence from which a jury could conclude that Guastella breached her duty and caused Hammond's death, there is a genuine issue of material fact and the matter should properly be decided by a jury. See MCR 2.116(C)(10); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Therefore, I must respectfully dissent from the majority's decision to reverse the trial court and grant summary disposition in favor of defendants.

/s/ Michael R. Smolenski